Supreme Court, U.S.
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No. -

In The

Supreme Court of the United States

DANIEL ROBINSON; et al. ("Class I");
Petitioners/Defendants,

vs.

ADMINISTRATIVE COMMITTEE OF THE
SEA RAY EMPLOYEE'S STOCK OWNERSHIP &
PROFIT SHARING PLAN et al.
Respondents/Plaintiffs,

and

SHARON BALDOCK; et al. ("Class II")
Respondents/Defendants.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented

I.
A.

Whether, under ***Firestone Tire & Rubber Co. v. Bruch***, 489 U.S. 101 (1989), the Language in the Respondent's Employee Stock Ownership and Profit Sharing Plan was Sufficient to Permit Review under the Arbitrary and Capricious Standard.

B.

Whether ***Firestone Tire & Rubber Co. v. Bruch***, 489 U.S. 101 (1989), Requires Deference to a Plan Administrator's Interpretation of a Federal Statute (26 U.S.C. § 411(d)(3)) and/or its Factual Findings that a Partial Termination Had Not Occurred.

C.

Whether a Plan Administrator's Decision May be Upheld on Grounds Other Than Those Given or Considered by the Plan Administrator Regardless of the Standard of Review.

II.

Whether, on an Appeal from a Decision Granting Summary Judgment, the Court of Appeals Properly Applied the Clearly Erroneous Standard of Review to Conclusions Crucial to the District Court's Holding that a Partial Termination of an ESOP Had Not Occurred.

Parties to Proceedings Below

DANIEL ROBINSON; MIKE DOMINQUEZ; WILLIAM SKINNER; LISA MOORE; CHERYL ELLIOTT; RICKY TAYLOR; JERRY WAYNE MASSEY; JAMES BARNES; SUE COOKE; RALPH DAVIS JONES; SCOTT LYONS; VICKI HARDENBURG; TIM CARROLL; BENNY HOUSEHOLDER; RANDY NEIL GARNER; BENJAMIN WILLIAMS; STEVEN WAYNE BLAIR; ROBERT MARKWALTER; LISA BOYER; SAMUEL ADAMS; JERRY HANCOCK, on behalf of themselves and all other similarly-situated individuals, ("Class I")

Petitioners/Defendants

vs.

ADMINISTRATIVE COMMITTEE OF THE SEA RAY EMPLOYEE'S STOCK OWNERSHIP & PROFIT SHARING PLAN; WILLIAM J. BARRINGTON, in their capacities as members of the Administrative Committee; DIANNE M. YACONETTI, in their capacities as members of the Administrative Committee; WILLIAM R. MCMANAMAN, in their capacities as members of the Administrative Committee

Respondents/Plaintiffs

and

SHARON BALDOCK; MARK LINDEMAN; EARL WAYNE HUMPHRIES; JEAN MARIE HOWARTH; WILLIAM SULLIVAN; ROY ELLIS; ARVIL ELLIS; GARY SOUTHWOOD; KENNETH HARRELL; EMILY SCHULTZ; FOREST JOSLIN; DEBORAH MCDANIEL, on behalf of themselves and all other similarly-situated individuals, ("Class II")

Respondents/Defendants

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Citations to Opinions and Orders

The decision of the United States Court of Appeals for the Sixth Circuit is reported as ***Administrative Committee of the Sea Ray Employees' Stock Ownership and Profit Sharing Plan v. Robinson***, 164 F.3d 981 (6th Cir. 1999), and is reprinted in the appendix to this petition at Apx. 1-15. The March 11, 1999, Order denying Class I's petition for rehearing and suggestion of rehearing en banc is not yet reported but is reprinted in the Appendix at Apx 94-95. The Memorandum and Order of the district court dated July 7, 1997 is reprinted in the Appendix at Apx. 16-19. The Report and Recommendation of the Magistrate Judge dated October 30, 1996, is reprinted in the appendix at Apx. 20-88. The Memorandum and Order of the District Court dated April 13, 1993, certifying two defendant classes is reprinted in the Appendix at Apx. 89-93.

Corporate Disclosure Statement

In accordance with Supreme Court Rule 29.6, the petitioners are not a nongovernmental corporation but a conditionally certified class of individuals formerly employed by Sea Ray boats. Apx. 89-93.

Statement of Jurisdiction

The United States Court of Appeals for the Sixth Circuit entered judgment on January 15, 1999, and denied the Class I Defendants-Appellants' Petition for Rehearing and Suggestion for Rehearing En Banc on March 11, 1999. Apx. 94. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

Statutes and Regulations

26 U.S.C. § 411(d)(3), provides that:

> Notwithstanding the provisions of subsection (a), a trust shall not constitute a qualified trust under section 401(a) unless the plan of which such trust is a part provides that -
>
> (A) upon its termination or partial termination, . . .
>
> > the rights of all affected employees to benefits accrued to the date of such termination, partial termination, or discontinuance, to the extent funded as of such date, or the amounts credited to the employees' accounts, are nonforfeitable.

26 C.F.R. § 1.411(d)-2(b)(1) provides that:

> Whether or not a partial termination of a qualified plan occurs (and the time of such event) shall be determined by the Commissioner with regard to all the facts and circumstances in a particular case. Such facts and circumstances include: the exclusion, by reason of a plan amendment or severance by the employer, of a group of employees who have previously been covered by the plan; and plan amendments which adversely affect the rights of employees to vest in benefits under the plan.

26 C.F.R. § 1.401-6 provides that:

> (a) General rules. (1) In order for a pension, profit-sharing, or stock bonus trust to satisfy the

requirements of section 401, the plan of which such trust forms a part must expressly provide that, upon the termination of the plan or upon the complete discontinuance of contributions under the plan, the rights of each employee to benefits accrued to the date of such termination or discontinuance, to the extent then funded, or the rights of each employee to the amounts credited to his account at such time, are nonforfeitable. As to what constitutes nonforfeitable rights of an employee, see paragraph (a)(2) of Sec. 1.402(b)-1.

* * *

(b) Termination defined. (1) Whether a plan is terminated is generally a question to be determined with regard to all the facts and circumstances in a particular case. For example, a plan is terminated when, in connection with the winding up of the employer's trade or business, the employer begins to discharge his employees. However, a plan is not terminated, for example, merely because an employer consolidates or replaces that plan with a comparable plan. Similarly, a plan is not terminated merely because the employer sells or otherwise disposes of his trade or business if the acquiring employer continues the plan as a separate and distinct plan of its own, or consolidates or replaces that plan with a comparable plan. See paragraph (d)(4) of Sec. 1.381(c)(11)-1 for the definition of comparable plan. In addition, the Commissioner may determine that other plans are comparable for purposes of this section.

(2) For purposes of this section, the term termination includes both a partial termination and a complete termination of a plan. Whether or not a partial termination of a qualified plan occurs when a

group of employees who have been covered by the plan are subsequently excluded from such coverage either by reason of an amendment to the plan, or by reason of being discharged by the employer, will be determined on the basis of all the facts and circumstances. Similarly, whether or not a partial termination occurs when benefits or employer contributions are reduced, or the eligibility or vesting requirements under the plan are made less liberal, will be determined on the basis of all the facts and circumstances. However, if a partial termination of a qualified plan occurs, the provisions of section 401(a)(7) and this section apply only to the part of the plan that is terminated.

Statement of the Case

Basis for Original Subject Matter Jurisdiction

The district court possessed subject matter jurisdiction over this case because the complaint filed by the Respondents raised a federal question under the Employee Retirement Income Security Act of 1974. 29 U.S.C. § 1132(e). Jurisdiction is also proper under 28 U.S.C. § 1331, because this case raises a federal question involving the interpretation and application of the Internal Revenue Code, as amended by § 1012 of ERISA. 26 U.S.C. §411(d)(3).

This action was filed in the United States District Court for the Eastern District of Tennessee on August 25, 1992, by the Administrative Committee of the Sea Ray Employees' Stock Ownership and Profit Sharing Plan and the three members thereof. (the "Committee"). Respondents sought a declaratory judgment that there had been no partial termination of the an Employee Stock Ownership and Profit Sharing Plan (ESOP), within the meaning 26 U.S.C. § 411(d)(3), as amended by the

Employee Retirement Income Security Act of 1974 ("ERISA"), and the terms of the Plan. Apx. 16.

By order of the district court, two defendant classes of former and present participants were defined. Petitioners, Class I, consisted of all former Sea-Ray employees who were participants in the plan, and whose service as employees ended between July 1, 1989, and June 30, 1991, and who had an interest in the plan that was not fully vested, as well as the beneficiaries of those former Sea-Ray employees. Respondents, Class II: consisted of the present and former Sea-Ray employees who are or were participants in the plan and who may be entitled under the terms of the plan to receive a portion of the forfeitures resulting from the termination of employment of members of Class I, as well as the beneficiaries of those present and former Sea-Ray employees. Apx. 89. The district court, upon the Committee's motion, appointed counsel to represent each class. Apx. 92.

After the filing of cross-motions for summary judgment, the United States Magistrate Judge issued a Report and Recommendation, which found that there had been no partial termination of the plan. Apx. 20. By order dated July 7, 1997, the district court adopted the Report and Recommendation of the Magistrate Judge. Apx. 16. On appeal to the United States Court of Appeals for the Sixth Circuit, the court of appeals affirmed the lower court's order in a decision filed January 14, 1999. Apx. 1. The court of appeals denied Class I's petition for rehearing with a suggestion for rehearing en banc on March 11, 1999. Apx. 94.

Statement of Facts

Title II of the Employee Retirement Income Security Act of 1974 (ERISA), amended the Internal Revenue Code of 1954 (the Code). Pub. L. 93–406, § 1012, codified as 26 U.S.C. § 411, amended the Code to codify existing regulations on minimum vesting standards for, among other things, employee stock ownership plans (ESOP). In order to be a "qualified trust," according to 26 U.S.C. § 411(d)(3), a plan must provide that "upon its termination or partial termination . . . the rights of all affected employees to benefits accrued to the date of such . . . partial termination . . . are nonforfeitable." ***See also*** 26 U.S.C. § 401(a); 26 U.S.C. § 4975(e)(7).

Since the 1950's, Ray Industries has manufactured pleasure boats under the brand name "Sea Ray." After a period of unprecedented growth, Sea Ray was acquired by Brunswick Corporation in 1986. At this time, Sea Rays adopted an employee stock bonus plan and an employee profit sharing plan (collectively referred to as the Plan). Apx. 3. Sea Ray continued to expand. By 1988 Sea Ray had 10 production facilities and three other divisions. By early 1989 Sea Ray had 4,425 employees. Apx. 37. Early in model year 1989, which began July 1, 1988, retail sales continued to grow. But in March and April of 1989, retail sales began a sharp decline which was to continue at least until July 1991.

In May 1989, Sea Ray instituted the first of a series of layoffs and plant closings. By July 12, 1989, Sea Ray had laid off eight (8) percent of its total workforce of production employees. Apx. 31. In July it decided to close three plants and by the end of July 1989, an ***additional*** 29% of the workforce was laid off bringing the total percent of the layoffs for the three-month period between April 21, 1989 to July 27, 1989, to 35%. Apx. 31-32.

In August 1989, Sea Ray consolidated the workforce at four of its East Tennessee plants into two plants and advised former employees that their "temporary layoff" was now a

permanent one. Apx. 32-33. Explaining that "[s]oftening consumer demand for marine products" was to blame, Sea Ray conducted "permanent" layoffs in July, August, September and December (1990) at several of its plants and as well as at its main headquarters in Knoxville, Tennessee. Apx. 34. Sea Ray closed its Oxford, Michigan plant effective January 1991; additional layoffs occurred in March and May 1991. Layoffs continued through December 1992, after this action was commenced. Apx. 35-36.

On June 30, 1989, there were 4,425 total employees. On June 30, 1990, the number of employees was 3,309. By June 30, 1991, there were 2,028 total corporate employees, a total workforce reduction (including voluntary departures) of 54.2% over this two year period. Apx. 37.

Sea Ray's sales decreased from a high of 24,538 units in 1988 to 10,542 units in 1991. Apx. 30. The effect on the ESOP was equally dramatic. The plan participants as of July 1, 1989 were 3,832. By July 1, 1990, the participants decreased to 3,060 and by July 1, 1991, the number of participants dropped to 1,968. Adjusted to account for added participants during this period, plan enrollment for this two year was diminished to 49% of what it was (from 4,139, the total participants during the two year period, to 1,968). Apx. 38-39.

The Committee and Class II contended (and the district court so held) that the reductions in the plan should be separated by plan years (July 1 to June 30) because, according to them, 40 percent of the 1990-91 plan year layoffs were caused by the enactment of a federal "luxury tax." Apx. 60. Class I argued against this because the undisputed evidence established that the layoffs were continuing in nature and had no relationship to the individual plan years. Apx. 35, 64. The Sixth Circuit affirmed the district court on this conclusion (as well as others) using the clearly erroneous standard of review despite the fact that the appeal was from a grant of summary judgment.

The luxury tax was enacted on November 5, 1990, and became effective January 1, 1991, i.e., halfway through Sea Ray's 1990-91 plan year. (Pub. L. 101-508, Sec. 11221).[1] With respect to the first sale of a boat, the Act imposed a 10 percent tax on any amount exceeding $100,000. Sea Ray built these luxury yachts at three Florida plants - Merritt Island, Palm Coast, and Sykes Creek. Apx. 6, 26-27, 35, 60. Of the 454 employees Class II argued were laid off because of the luxury tax, at least 204 of them were laid off between July 1, 1990 (the beginning of the plan year) and November 5, 1990. The 204 employees laid off before the enactment of the luxury tax consisted of 74 employees laid off on July 6, 1990 from the Palm Coast plant, 35 and 95 employees who were layoff notices on September 28, 1990 from the Merritt Island and Palm Coast plants, respectively. Apx. 34-35. (This assumes, of course, that the remaining layoffs at the Merritt Island and Palm Coast plants were entirely attributable to the luxury tax.)

The Administrative Committee met in June 1992, to consider whether a partial termination had occurred. As the Magistrate Judge aptly stated, "[i]t is unclear if the percentage considerations were sufficiently examined at the meetings," Apx. 87, despite the fact that the Committee was aware of the potential that a sufficiently sizable decline in plan participation for reasons beyond the control of the employer may constitute a partial termination. Apx. 25, 84-85. The Committee, nevertheless, concluded that there had not been a partial termination because the reductions were caused by general economic conditions and not by an intent to "abuse" the plan. ***Id***.

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[1] The tax on boats was repealed in 1993 by Pub L. 103-66, § 13161.

Argument

I.

A.

Whether, under ***Firestone Tire & Rubber Co. v. Bruch***, 489 U.S. 101 (1989), the Language in the Respondent's Employee Stock Ownership and Profit Sharing Plan was Sufficient to Permit Review under the Arbitrary and Capricious Standard.

In ***Firestone Tire & Rubber Co. v. Bruch***, 489 U.S. 101(1989), this Court held that "a denial of benefits challenged under [29 U.S.C. §] 1132(a)(1)(B) is to be reviewed under a de novo standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." ***Id.*** at 115. Because the Firestone plan did not confer any discretionary authority, the Court did not set forth criteria courts should use in examining the type of language which would confer discretionary authority on a plan administrator.

The question presented here is whether the language in the Sea Ray plan is sufficient to confer a deferential standard of review on the Committee's decision to deny benefits to terminated employees because, as the Respondent Committee decided, no partial termination had occurred.[2]

After ***Firestone***, most courts of appeals held that deferential review was required only by plan language which establish a "clear grant of discretion," ***Perez v. Aetna Life Ins. Co.***, 150 F.3d 550, 555 (6th Cir. 1998) (en banc), or by plan

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[2] While the Court did not expressly hold that discretionary authority language in a plan will mandate an abuse of discretion review, the lower courts have generally adopted this as the alternative to the *de novo* standard of review. ***Varity Corp. v. Howe***, 516 U.S. 489, 513 (1996).

language which "expressly confers" discretionary authority on the plan administrator. ***Lynd v. Reliance Standard Life Ins. Co.***, 94 F.3d 979, 981 (5th Cir. 1996); ***see also Terry v. Bayer Corp.***, 145 F.3d 28 (1st Cir. 1998) ("clear discretionary grant" required); ***Wheeler v. Dynamic Engineering, Inc.***, 62 F.3d 634 (4th Cir. 1995) (must be an express grant of discretion); ***Hickey v. A. E. Staley Mfg.***, 995 F.2d 1385 (7th Cir. 1993) (de novo review applied because plan did not "expressly give" administrator discretion); ***Oldenberger v. Central States Southeast and Southwest Areas Teamster Penion Fund***, 934 F.2d 171 (8th Cir. 1991) (plan must "expressly give" administrator discretion); ***Bogue v. Ampex Corp.***, 976 F.2d 1319, 1325 (9th Cir. 1992), ***cert. den.*** 507 U.S. 1031 (1993) (administrator had discretion only where discretion was "unambiguously retained"); ***Kirwan v. Marriott Corp.***., 10 F.3d 784 (11th Cir. 1994) ("express language unambiguous in its design"); ***but see Hullett v. Towers, Perrin, Forster & Crosby, Inc.***, 38 F.3d 107 (3rd Cir. 1994) (express language not necessary, discretion may be implied); ***Heasley v. Belden & Blake Corp.***, 2 F.3d 1249 (3rd Cir. 1993) (clear and unequivocal grant of discretionary authority not necessary); ***Snow v. Standard Ins. Co.***, 87 F.3d 327, 330 (9th Cir. 1996) (discretion may be implied).

Despite these statements, the courts of appeals have struggled to apply ***Firestone*** consistently. The Court need only compare the recent ***en banc*** decision from the Sixth Circuit, in ***Perez***, with the even more recent ***en banc*** decision of the Ninth Circuit in ***Kearney v. Standard Insurance Co.***, ___ F.3d ___ (9th Cir. 1999). Despite very similar plan language,[3] the ***en banc*** Ninth Circuit expressly disagreed with the ***en banc*** Sixth Circuit's application (in ***Perez***) of the abuse of discretion

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[3] The operative language in ***Kearney*** was "upon receipt of satisfactory written proof" while in ***Perez*** the plan stated the administrator had the "right to require as part of the proof of claim satisfactory evidence." 150 F.3d at 552.

standard of review. That two federal courts of appeals had to resolve an issue of plan interpretation ***en banc*** would be proof enough of the need for guidance in this area. That they disagreed on the interpretation of virtually similar language confirms the following observation in the PENSION PLAN GUIDE ¶ 5920 (CCH 1998):

> While the general principles are clear enough, many questions remain. The Court [in ***Firestone***] failed to provide specific guidance as to what plan language is necessary to grant discretionary authority to an administrator or fiduciary, thus insuring that their decision are accorded deference by the courts. Furthermore, the Court did not define the scope of the ***de novo*** standard of review or the "new" deferential standard of review.
>
> Case law since the ***Firestone*** decision has helped to fill in the gaps left by the Court. However, with the Circuits developing their own rules, there are inconsistencies in the application of the Firestone rules.

In addition, the Sixth Circuit's decision herein conflicts with the interpretation given similar plan language by the Eleventh Circuit Court of Appeals. The language in the Sea Ray plan stating the powers of the Administrative Committee is in Section 16:

> The Committee shall have all powers necessary to enable it to administer the Plan and Trust Agreement in accordance with their provisions, including without limitation the following:
>
> . . . . .
>
> (2) determining the appropriate allocations to Participants' Accounts pursuant to Section 6;

> (3) determining the amount of benefits payable to a Participant (or Beneficiary), and the time and manner in which such benefits are to be paid;
>
> . . . . .
>
> (7) construing and interpreting the Plan and the Trust Agreement and adopting rules for administration of the Plan that are consistent with the terms of the Plan documents and of ERISA and the Code;
>
> . . . . .
>
> The Committee shall perform its duties under the Plan and the Trust Agreement solely in the interests of the Participants (and their Beneficiaries). Any discretion granted to the Committee under any of the provisions of the Plan or the Trust Agreement shall be exercised only in accordance with rules and policies established by the Committee which shall be applicable on a nondiscriminatory basis.

The Sixth Circuit held that this language "clearly grants discretion to the committee" reasoning "[w]hile terms . . . such as 'construe' and 'interpret' by themselves would likely be enough to establish discretion, we need not decide that issue because § 16 also expressly gives the Committee 'discretion.'" 164 F.3d at 986. While the plan does use the word "discretion," the context in which it is used plainly shows that it was merely imposing a ***limit*** on discretion that may be granted by other plan provisions.[4]

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[4] The court of appeals and the district court may have attached some significance to the phrase in section 16 which provides the Committee with "all powers necessary to enable it to administer the Plan and Trust Agreement in accordance with their provisions." But because this phrase is simply a restatement of the authority and responsibility the common law vested in every trustee, ***Central States, Southeast & Southwest Areas***

The Sixth Circuit's decision in this case conflicts with the decision of the United States Court of Appeals for the Eleventh Circuit which held the de novo standard of review applied where the plan gave the administrator the "authority to control and manage the operation and administration of the Plan" and the authority to "promulgate such rules and regulations as deemed necessary and proper to interpret or administer the Plan." ***Kirwan***, 10 F.3d at 788. The Eleventh Circuit reasoned that this language "falls short of the express grant of discretionary authority necessary to trigger the arbitrary and capricious standard of review," because the grant of authority to promulgate rules and regulations is "merely a grant of administrative powers." Indeed, the Sixth Circuit's decision in this case is inconsistent with its own decision in ***Wulf v. Quantum Chem. Corp.***, 26 F.3d 13 68, 1372 (6th Cir. 1994), ***cert den***. 513 U.S. 1058 (1994), which followed the ***Kirwan*** decision. While both decisions were relied upon by Class I in their briefs, they were ignored by the panel.

The key omission in the Sea Ray plan is the absence of any ***discretionary*** authority to construe or interpret disputed terms in the plan. 418 U.S. at 115.[5] ***See also Varity Corp.***, 516 U.S. at 502-04. Authority to "construe and interpret the Plan" confers no ***discretionary authority***. It does not "clearly and

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Pension Fund v. Central Transport, Inc., 472 U.S. 559, 570 (1985), it is not sufficient to confer deferential review either under the common law of trusts or ERISA. ***Firestone***, 489 U.S. at 111 & 113.

[5] ***Firestone*** is ambiguous on this point. The express holding in that case requires a plan to contain a grant of discretionary authority, 418 U.S. at 115. Other language in the decision, however, referred to the fact that Firestone's plan did not give the administrator the "power to construe uncertain terms." 489 U.S. at 111. In ***St. Mary's Honor Center v. Hicks***, 509 U.S. 502, 515 (1993), the Court cautioned that it was "generally undesirable, where holdings of he Court are not at issue, to dissect the sentences of the United States Reports as though they were the United States Code."

explicitly determine the character of the power," Bogert & G. Bogert, LAW OF TRUSTS AND TRUSTEES 552, p. 66 (2d rev. ed. 1980), because it is not a conferral of the "power to control what the plan did." ***Mertins v. Hewitt Associates***, 508 U.S. 248, 262 (1993). The grant here is little more than a restatement of the obligation every trustee has to "acquaint[] himself with the terms of the trust. . . ." Restatement (Second) of Trusts 174, comment c (1959).

B.

Whether ***Firestone Tire & Rubber Co. v. Bruch***, 489 U.S. 101 (1989), Requires Deference to a Plan Administrator's Interpretation of a Federal Statute (26 U.S.C. § 411(d)(3)) and/or its Factual Findings that a Partial Termination Had Not Occurred.

After holding that the plan conferred "discretion" upon the Committee, the Sixth Circuit held that it would defer to the Committee's determination that a partial termination had not occurred. In so doing, the court expressly disagreed with decisions from other courts of appeals. Apx. 8-9. In ***Weil v. Retirement Plan Admin. Comm.***, 913 F.2d 1045, 1048-49 (2nd Cir. 1990), on petition for rehearing, 933 F.2d 106 (2nd Cir. 1991) (***Weil II***), the court held that the determination of whether a partial termination had occurred was a question of law, and therefore the fiduciary's decision was not subject to deference. ***See also Gauer v. Connors***, 953 F.2d 97, 99-100 (4th Cir. 1991); ***Penn v. Howe-Baker Engineers, Inc.***, 898 F.2d 1096 (5th Cir. 1990); ***Pratt v. Petroleum Production Mgt. Inc. Employee Sav. Plan and Trust***, 920 F.2d 651, 657 (10th Cir. 1990).

By reviewing the Committee's decision under the arbitrary and capricious standard, the Sixth Circuit gave greater deference on a matter of statutory interpretation to a plan

administrator than a court gives to an agency charged with interpreting the same statute. ***Cf. Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.***, 467 U.S. 837, 844-45 (1984). The Sixth Circuit's only reason for doing so was that the language of the statute was included in the plan. But every plan provides for the contingency of a partial termination and the decision as to whether a partial termination has occurred should not be regarded as a matter of plan interpretation.[6] As the Second Circuit recognized in ***Weil II***, the inquiry requires an interpretation of the Internal Revenue Code, tax regulations, as well as federal court and tax court decisions. 933 F.2d at 107-09. Even if a plan expressly granted a plan administrator the power to construe a federal statute, and the instant plan does not, it would still be inappropriate to defer to a plan administrator's interpretation of that statute.

Closely related to the conflict created by the Sixth Circuit's decision in this case is the conflict among the circuits on on whether ***Firestone*** applies to factual findings by an administrator.

In ***Firestone,*** 489 U.S. 108, this Court limited its discussion to "the appropriate standard of review in [29 U.S.C.] § 1132(a)(1)(B), actions challenging denials of benefits based on plan interpretations." One commentator has observed that "courts of appeals have disagreed about whether the ***Bruch*** standard should only 'be applied when a benefits decision turns on the facts of the case, rather than the interpretation of the terms in the ERISA plan.'" Grant, Note, ***Battling for ERISA Benefits in the Ninth Circuit: Overcoming Abuse of Discretion Review***, 28 SOUTHWESTERN UNIVERSITY LAW REVIEW 93, 99 (1998) (quoting ***Pierre v. Connecticut Gen.***

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[6] In ***Bruch v. Firestone Tire & Rubber Co.***, 828 F.2d 124, 151 (3rd Cir.1987), ***aff'd in part, rev'd in part***, 489 U.S. 101 (1989), the court of appeals noted that the loss of tax qualified status is a "very severe penalty" and as a result all qualifying pension plans contain the assurances" set forth in § 411(d)(3).

Life Ins., 502 U.S. 973, 974 (1991) (White, J. dissenting from denial of certiorari).

The majority of courts of appeals have held that ***Firestone's de novo*** review requirement extends to factual determinations made by plan administrators unless the plan "explicitly vests fact-finding discretion in the plan administrator." ***Rowan v. Unum Life Ins. Co. of America***, 119 F.3d 433 (6th Cir.1997); ***accord Heidgerd v. Olin Corp.***, 906 F.2d 903, 908-09 (2nd Cir. 1990); ***Luby v. Teamsters Health, Welfare, and Pension Trust Funds***, 944 F.2d 1176 (3d Cir.1991); ***Reinking v. Philadelphia American Life Ins. Co.***, 910 F.2d 1210 (4th Cir.1990), overruled on other grounds, ***Queisinberry v. Life iNs. Co. of North America***, 987 F.2d 1017 (4th Cir. 1993); ***Ramsey v. Hercules Inc.***, 77 F.3d 199, 203-04 (7th Cir. 1996); ***Paramore v. Delta Airlines***, 129 F.3d 1446 (11th Cir. 1997).

In contrast, the United States Court of Appeals for the Fifth Circuit has held that it is appropriate under ***Firestone*** to apply different standards of review to claim denials based on factual determinations than are applied to denials based on interpretations of plan language. ***Pierre v. Connecticut General Life Ins. Co.***, 932 F.2d 1552 (5th Cir.), ***cert. denied***, 502 U.S. 973 (1991); ***Wildbur v. Arco Chemicals***, 974 F.2d 631, 635 (5th Cir. 1992). The Fifth Circuit continues to adhere to this position. ***Meditrust Financial Services Corp. v. The Sterling Chemicals, Incorporated, Medical Benefits Plan for Hourly-paid Employees***, 168 F.3d 211, 214 (5th Cir. 1999). The Eighth Circuit appears to agree with the Fifth Circuit's position. ***Cox v. Mid-America Dairyman, Inc.***, 965 F.2d 569, 571 n. 2 (8th Cir. 1992).

Class I has repeatedly argued that, even if a court defers to a plan administrator's legal conclusions, a court should not defer to an administrator's interpretation of a statute for the same reason the court does not defer to factual findings of the Committee. Even if the plan gives the Committee some discretionary authority, nothing in the plan gives the

Committee the power to make factual findings. There is no language in the plan which gives the Committee the authority to determine "eligibility for benefits," language the courts of appeal have found to be sufficient to confer deferential review of a plan administrator's factual findings.[7] ***E.g.***, ***Paramore***, 129 F.3d at 1450-51.

A number of courts and writers have written about the need for further guidance on these issues. One commentator summed up the problems as follows:

> Although the Supreme Court intended ***Bruch*** to bring uniformity to the circuits and settle the controversy over the standard of review, it did not succeed in doing so; rather, it appeared to engender considerable confusion. There was some uncertainty as to what kind of plan language was sufficient to grant an administrator or trustee "discretion," thus lowering the standard from de novo to abuse of discretion. Other courts were unsure how to undertake a de novo review, and many were confused as to whether the new abuse of discretion standard

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[7] In accepting the Magistrate Judge's report, the district court aptly commented that the Magistrate Judge "had to wrestle with the familiar, ***yet difficult***, question of the appropriate standard of review to apply to the decision of the Plan's administrator." Apx. 18 (emphasis added). The Magistrate Judge's very conscientious attempt to construe the plan is nevertheless a perfect example of the need for guidance. The Magistrate Judge held that a provision in the plan which gave the Committee authority to "determine the amount" of benefits gave the Committee discretion to determine whether benefits were payable ***at all*** because of a partial termination. Apx. 44. The Sixth Circuit made the same mistake, Apx. 9, ignoring its own prior decision which held that a grant of the power to determine the "amount of the benefits" to which a participant may be entitled was not a grant of discretionary authority to interpret the plan. ***Anderson v. Great West Life Assur. Co.***, 942 F.2d 392, 394 (6th Cir. 1991).

was less or more stringent than the previous arbitrary and capricious standard, or whether it was the same.

Heyl, Note, ***Bedrick v. Travelers Insurance Co.*: *The Fourth Circuit's Continued Attempt to Work with the "Doctrinal Hash" of the Standard of Review in ERISA Benefit-Denial Cases***, 75 NORTH CAROLINA L. REV. 2382, 2406-07 (1997) (and cases cited therein).

C.

Regardless of the Standard of Review, May A Federal Court Uphold A Plan Administrator's Decision on Grounds Other Than Those Given or Considered by the Plan Administrator.

In addition to the standard of review, a significant issue in this case related to whether the court was limited to considering the evidence considered by the Committee. While the Sixth Circuit held that the abuse of discretion standard of review applied to the Committee's decision, it then considered evidence not relied upon or considered by the Committee. In so doing, it disregarded its own precedent, in which it held that where a court is reviewing a plan administrator's decision deferentially, the court is limited to the factual record compiled by the plan administrator absent exceptional circumstances. ***Wilkins v. Baptist Healthcare System, Inc.***, 150 F.3d 609, 613 & 618 (6th Cir. 1998); ***Perry v. Simplicity Eng'g*** , 900 F.2d 963, 966-67 (6th Cir. 1990); ***accord Sandoval v. Aetna Life & Casualty Ins. Co.***, 967 F.2d 377 (10th Cir.1992).

The lower courts are divided on how to review a plan administrator's decision. With respect to the de novo standard, the Second Circuit, in ***DeFelice v. American International Life***, 112 F.3d 61 (2nd Cir. 1997), observed that courts "presented with this issue have reached varied results:"

The Sixth Circuit has held that no evidence beyond the administrative record is permissible, on the grounds that district courts ought not to become "substitute plan administrators." ***Perry v. Simplicity Eng'g*** , 900 F.2d 963, 966-67 (6th Cir. 1990). While the Eleventh Circuit seems comfortable allowing district courts to rely upon entirely new evidence without restriction, ***Moon v. American Home Assurance Co.*** , 888 F.2d 86, 89 (11th Cir. 1989), other courts, including the Eighth Circuit, have permitted some additional evidence where the administrative record is inadequate to conduct a proper review of the administrative decision. ***Donatelli v. Home Ins. Co.***, 992 F.2d 763, 765 (8th Cir. 1993) (decision within discretion of trial court, which should not be exercised absent good cause); ***Quesinberry v. Life Ins. Co. of N. Amer.*** , 987 F.2d 1017, 1021-27 (4th Cir. 1993) (en banc); ***cf. Luby v. Teamsters Health, Welfare, and Pension Trust Funds***, 944 F.2d 1176, 1184-85 (3d Cir. 1991) (where record is sufficiently developed below, court may limit review to that evidence even upon de novo review). The Second Circuit has considered one aspect of this issue, and has held that additional evidence may be considered upon de novo review of an issue of plan interpretation. ***See Masella v. Blue Cross & Blue Shield of Connecticut, Inc.***, 936 F.2d 98, 103-05 (2d Cir. 1991). Masella explicitly did not decide whether additional evidence may be considered upon de novo review of factual issues. It noted, however, that a claimant might be obligated to present to plan administrators all evidence regarding the claimant's condition, id. at 105, but would be unfairly burdened by an obligation to present expert testimony to plan administrators on an issue of plan interpretation. Id.

If de novo review is appropriate in the instant case, then it will be essential for the Court to clarify how a court should review a plan administrator's decision and whether that decision can be upheld by a court on grounds other than those relied upon by the Administrator. The Court should also resolve the evidence a lower court may consider in reviewing the administrator's decision.

But especially if discretionary review is appropriate, the Court should address whether a court may uphold a plan administrator's decision on grounds other than those relied upon by the plan administrator. For example, a significant factor to consider in a partial termination claim is the total percentage reduction of plan participants. ***Halliburton Co. v. C.I.R.***, 100 T.C. 216, 236-37 (1993), ***aff'd***, 25 F.3d 1043 (5th Cir.), ***cert. denied*** 513 U.S. 989 (1994). In this case, the Sixth Circuit found that the Committee "decided to calculate the percentage of layoffs for each [plan] year separately." Apx. 6. But the chair of the Committee admitted that the Committee did not calculate the reduction percentages by separate plan years. Apx. at 85. Instead, separate plan year calculations were ***first*** proposed after the complaint was filed. Apx. 64. While there are other examples of "post - hoc" justifications for the Committee's decision, they will be addressed as part of Question II.

Conclusion to Question I

"The basic thrust of the [ERISA] pre-emption clause . . . was to avoid a multiplicity of regulation in order to permit the nationally uniform administration of employee benefit plans." ***New York State Conference of Blue Cross Plans v. Travelers Ins. Co.***, 514 U.S. 645 (1995). With over 9,000 ERISA claims being filed in each of the last five years, ***see*** Table C-2A of JUDICIAL BUSINESS OF THE UNITED STATES COURTS 1998, the current state of disarray on how to review a plan administrator's decision unquestionably compromises a

fundamental purpose of ERISA, warranting further review by this Court.

II.

Whether, on an Appeal from a Decision Granting Summary Judgment, the Court of Appeals Properly Applied the Clearly Erroneous Standard of Review to Conclusions Crucial to the District Court's Holding that a Partial Termination of an ESOP Had Not Occurred.

The Sixth Circuit erroneously applied the "clearly erroneous" standard of review to four issues decided by the district court (and the magistrate judge). The first issue concerned the district court's decision that the individuals who resigned from their employment with Sea Rays were not "constructively discharged" even though the court of appeals agreed with Class I's assertion that "that some former Sea Ray employees felt compelled to leave in light of the economic downturn." Apx. 13-14. The court of appeals further held that it was not "firmly convinced" that the district court erred in deciding that the layoffs attributed to the luxury tax amounted to second "major corporate event." Apx. 13. Based upon this finding, the court of appeals then upheld the division of the reductions into separate plan years. Finally, the court of appeals held the district court's adoption of Class II's reduction percentages was not "clear error." Apx. 14.

The appeal was pending before the district court on cross-motions for summary judgment. Apx. 6, 17, 20. On appeal from the grant of a summary judgment motion, the appellate court is supposed to review the record using the same standard applied by the district court, whether there is a genuine issue of material fact. ***See Hunt v. Chromartie***, ___ U.S ___, 67 U.S.L.W. 4306 (1999).

To understand the harm caused by these findings it is necessary to review the "common law" of partial terminations, as it has been derived by the federal courts and the tax court. A "plain english" definition of "partial termination" appears in ***Morales v. Pan American Life Ins. Co.***, 718 F.Supp. 1297, 1302 (E.D.La. 1989), ***aff'd***., 914 F.2d 83 (5th Cir. 1990):

> A partial termination occurs when, in connection with a major corporate event, a significant percentage of employees covered by the plan are involuntarily excluded or terminated from participating in the plan.

The Department of the Treasury regulations require consideration of all the "facts and circumstances":

> Whether or not a partial termination of a qualified plan occurs (and the time of such event) shall be determined by the Commissioner with regard to all the facts and circumstances in a particular case. Such facts and circumstances include: the exclusion, by reason of a plan amendment or severance by the employer, of a group of employees who have previously been covered by the plan; and plan amendments which adversely affect the rights of employees to vest in benefits under the plan.

26 C.F.R. § 1.411(d)-2(b)(1).

The partial termination provision has two purposes: to protect employees legitimate expectations of benefits and to prevent employers from taking unfair advantage of the favorable tax treatment. ***Halliburton***, 100 T.C. at 227, citing ***Gluck v. Unisys Corp.***, 960 F.2d 1168, 1182-83 (3d Cir. 1992), and ***Chait v. Bernstein***, 835 F.2d 1017, 1021 (3d Cir. 1987). Congress recognized when enacting ERISA that a partial

termination could occur as a result of "a large reduction in the work force." S. Rept. 93-383, at 50 (1973).

"An additional circumstance which courts attempt to identify in deciding whether a partial termination has occurred is the occurrence of a major corporate event in connection with the reduction in plan participation." ***Halliburton***, 100 T.C. at 230. The purpose of identifying a major corporate event is to be able to identify the cause for the reduction in plan participants. Respondents' claim that there are two major corporate events here is an attempt to argue there were two underlying causes of the massive reductions in plan participants. As the Tax Court explained it, "Reductions in participation unrelated to such cause are not relevant to the question of whether a partial termination occurred . . . ." ***Id***.

Creating an artificial split in the plan years was an important part of Respondents' litigation strategy (even though it was never part of the Committee's reasoning) because it is uniformly held that "the size of the drop in plan participation resulting from the event" is one "of the most important facts" bearing on the issue. ***Id***. at 231; ***Kreis v. Charles O. Townley, M.D. and Associates, P.C.***, 833 F.2d 74, 79 (6th Cir. 1987). Indeed, the percentage of the reduction in plan participation in and of itself may be sufficient to constitute a partial termination. ***Id***. at 80. The purely artificial splitting in the plan years allows Respondents to keep the reduction percentages as low as possible despite a continuing and uninterrupted reduction in the work force.

Resolution of the partial termination issue in this case turned upon the application of two factors: the "major corporate event" issue and how to take into account the employees who quit working at Sea Ray because of the volatile uncertain economic times.

The analysis of the major corporate event begins with the luxury tax. Respondents argued that during plan year 1990-1991, 454 employees were laid off from the three plants that built luxury boats. Apx. 60. But what Respondents failed to

acknowledge was the undisputed fact that at least 204 of these employees were laid-off ***before*** the bill imposing the luxury tax was even ***introduced*** into Congress.[8] Apx. 34-37, 60. The luxury tax could not possibly have influenced these layoffs, thus casting considerable doubt on Class II contention (which the district court adopted) that the reductions caused by the luxury tax represented 44 percent of the reductions for plan year 1990-1991. Apx. 34-36, 60. But Class II's reasoning was circular: separate plans years were appropriate because a large percentage of the layoffs in the ***second plan year*** were caused by the luxury tax. Nothing in the IRS Plan Termination Handbook, on which Class II relied, mandates the use separate plan years. The proposition has been expressly rejected by one court:

> Defendants argue that in determining whether a vertical partial termination occurred the Court should consider only the number of employees excluded within a single plan year. The Court does not find this position to be supported by logic or required by authority. . . .There is nothing in the language of the rule itself, however, that requires that a significant corporate event occur within a year, and the ending of a calendar year has no intrinsic relevance in making this evaluation.

In re Gulf Pension Litigation, 764 F. Supp. 1149, 1166-67 (S.D. Tex. 1991), ***aff'd sub nom., Borst v. Chevron Corp.***, 36 F.3d 1308 (5th Cir. 1994), ***cert. den.*** 514 U.S. 1066 (1995).

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[8] H.R. 5835 was introduced into the 101st Congress on October 15, 1990. It was passed on November 5, 1990, and became Pub. L. 101-508. It should also be remembered that the plan year ran from July 1 to June 30. The 204 employees laid off before the enactment of the luxury tax consisted of 74 employees laid off in July 1990 from the Palm Coast plant, 35 employees laid off from the Merritt Island plant in September 1990 and 95 employees laid off from Palm Coast in September 1990. Apx. 34.

The district court's only reason for dividing the reductions into separate plan years was its conclusion that the luxury tax brought about an "additional large wave of layoffs." Apx. 65. What is important here is in using the clearly erroneous standard of review, the Sixth Circuit ignored Class I's argument that the impact of the luxury tax could not justify artificially dividing ***all*** of the workforce reductions -- including the work force reductions at plants which made boats not subject to the luxury tax -- by separate plan years.

The Sixth Circuit also ignored Class I's argument that separate plan year reduction percentages were inappropriate because the ***Committee*** did not divide the percentages into separate plan years but, as member Barrington testified, examined them over the "the ***total*** two year period." Apx. 85 (emphasis added). Respondents cannot have it both ways. If the Committee's decision on the partial termination issue must be reviewed for an abuse of discretion, then it is disingenuous for them to argue the Committee's decisions should be affirmed on grounds other than those relied upon or even considered by the Committee. These were disputed issues of fact which the court of appeals should have reviewed ***de novo***. ***See Matsushita Electric Industrial Co. v. Zenith Radio***, 475 U.S. 574 (1986).

The Sixth Circuit also applied the clearly erroneous standard to the constructive discharge issue relying upon its decision in ***Kreis***, 833 F.2d at 81. Apx 13. While the court of appeals agreed with Class I's assertion that "some former Sea Ray employees felt compelled to leave in light of the economic downturn." Apx. 13. It held, however, that this was not enough to support a claim of constructive discharge. The Sixth Circuit gave no consideration to whether it was consistent with the intent of the partial termination statute for it to apply the rigorous constructive discharge standard to the facts of a partial termination case involving thousands of workers. ***See Sure-Tan, Inc. v. NLRB***, 467 U.S. 883, 895 (1984).

The Sixth Circuit's application of the constructive discharge doctrine establishes that it misunderstood the nature of the partial termination statute. This is shown by its statement that "[t]o characterize the conditions at Sea Ray as intolerable is to impute liability to the company simply because of broad economic conditions which were beyond the company's control." Apx. 13. But the partial termination rule is designed to protect the vesting of employee pension benefits. ***Halliburton***, 100 T.C. at 227. The "remedy" for a "violation" is to immediately vest 100% of the employers' ***previously made*** contributions to the affected employees' accounts. 26 U.S.C. § 411(d)(3). There would be no liability on the part of Sea Ray, the employer, if for no other reason than that it is not a party to this lawsuit. Indeed, a finding of a partial termination imposes no "liability" on the plan itself. Rather, a partial termination finding ***prevents*** a forfeiture of accrued but not fully vested benefits and precludes the Class II Respondents (who were or would be fully vested participants) from receiving a windfall.

In short, the focus should not be on whether employees were constructively discharged as that term is commonly used but on the reason employees left, i.e., was the departure related to the downturn in economic conditions. See ***Halliburton***, 100 T.C. at 230. There, the Tax Court held that "employees who leave of their own accord after it is clear that there is no prospect of continuing to work for the employer may also be considered as having been involuntarily terminated." 100 T.C. at 240. Where layoffs on the scale presented in this case are considered, the partial termination inquiry should be sufficient broad so as to encompass so-called "voluntary" departures when the evidence shows that the employer did not replace the position vacated by the departing employee within a reasonable period of time.

The rules of the Supreme Court provide that certiorari will be considered where a federal court of appeals "has so far departed from the accepted and usual course of judicial

proceedings . . . as to call for an exercise of this Court's supervisory power." S.Ct. Rule 10(a). The Sixth Circuit application of the clearly erroneous standard of review in a summary judgment appeal is a quintessential example of a significant departure from accepted judicial proceedings.

Conclusion

For the reasons herein discussed, petitioners pray that this petition for a writ of certiorari should be granted and that a writ of certiorari issue to review the decision and judgments of the United States Court of Appeals for the Sixth Circuit entered on January 14, 1999 and March 11, 1999.

Respectfully submitted,

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